Nichols House Nursing Home *and* New England Healthcare Employees Union, District 1199, a/w Service Employees International Union, AFL–CIO. Cases 1–RC–21085 and 1–RC–21086.

December 15, 2000

DECISION, DIRECTION, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND FOX

The National Labor Relations Board has considered objections and determinative challenges in an election held October 26, 1999, and the hearing officer's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots of voting unit A shows 3 for and 2 against the Petitioner with 2 challenged ballots, and the tally of ballots of voting unit B shows 46 for and 39 against the Petitioner with no challenged ballots.[1] The Employer's exceptions are confined to the hearing officer's recommendation that the challenges to the ballots of Joyce Cummings and Susan Briggs in voting unit A be sustained on community of interest grounds.[2]

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings[3] and recommendations only to the extent consistent with this Decision, Direction, and Certification of Representative.

The Employer maintains a 106-bed long-term skilled care nursing home facility. The facility is run by David Jasinski, the administrator who is responsible for all clinical, financial, and employment matters. Second in command of the Employer's facility is the director of nursing services (DNS) who is also in charge of the nursing department. The assistant director of nursing services (ADNS) is third in command. The duties of the DNS and the ADNS, who are stipulated supervisors, include disciplining, hiring, firing, approving vacation time, evaluating employees, and the administration of labor relation matters. The Employer also employs two supervisors and a nurse manager, also referred to as a unit manager.

The Union filed a representation petition on September 20, 1999,[4] seeking to represent all the registered nurses, licensed practical nurses, and service and maintenance employees employed by the Employer. On or about that same day, Joselyn Opazda resigned from her position as DNS and on September 21, Nancy Ferreira resigned from her position as ADNS. Opazda's last day of employment for the Employer was October 29, while Ferreira's last day was October 13.

Cummings, who worked for the Employer as a per diem charge nurse, was hired to fill the DNS position on October 5, and Briggs, who was working for the Employer as a unit manager, was hired to fill the ADNS position on October 8. By memorandum, on October 15, the Employer announced to the employees that Cummings and Briggs would be, respectively, the new DNS and ADNS on or about November 8. There is no indication that the Employer deviated from any practice in the manner in which it filled the positions or announced the promotions to its staff. Two days before the election, the Employer introduced Cummings as the new DNS by assembling the employees at the nursing station.[5] The Employer also referred to the promotions of Cummings and Briggs in a campaign letter it sent to employees during the week before the election. Neither Cummings nor Briggs performed any DNS and ADNS duties until November 8.

The hearing officer recommended that the challenges to Cummings' and Briggs' ballots be sustained on the grounds that their pre-election hiring into the stipulated supervisory positions of director and assistant director of nursing services, respectively, as well as the announcement of their appointments to the employees and the Employer's conduct in holding them out to employees as the new DNS and ADNS, demonstrated that they lacked a sufficient community of interest with the unit employees to be considered eligible voters. The Employer excepts, contending that the record evidence does not support the hearing officer's finding that no community of interest existed at the time of the election between Cummings and Briggs, on the one hand, and the other bar-

[1] There were two separate voting groups in this election. Voting unit A was composed of the Employer's professional employees, and voting unit B was comprised of its nonprofessional employees. The professional employees in voting unit A unanimously cast their votes against inclusion in a single unit with nonprofessional employees.

[2] Consistent with the hearing officer's report, we certify the Union as the exclusive representative of the nonprofessional employees (voting unit B) in a separate unit. In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Employer's Objections 1, 2, and 3, and the hearing officer's finding that the evidence does not establish that Cummings and Briggs are supervisors as defined by Sec. 2(11) of the Act.

[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[4] All dates are in 1999 unless otherwise indicated.

[5] Contrary to the record evidence, the hearing officer stated that Jasinski announced Briggs' appointment at the same time he personally introduced Cummings.

gaining unit employees.[6] We agree with the Employer and reverse the hearing officer's recommended sustaining of the challenged ballots. Applying established precedent, we find, for the reasons set forth below, that the challenges to the ballots of Joyce Cummings and Susan Briggs in voting unit A should be overruled.

As was clear from the Employer's October 15 announcement, neither Cummings nor Briggs were to begin performing the duties of their new jobs until after the October 26 election, on November 8. Jasinski's personal introduction of Cummings to certain shift employees on October 24, as the new DNS as of November 8, and the Employer's statements concerning the promotions in its undated campaign literature do not detract from the fact that the current status of the two individuals as of the date of the election was unchanged. In this regard, both Cummings and Briggs, during the critical period, continued to perform the same work as they had performed previously, which duties were found by the hearing officer to be insufficient to confer supervisory status. Further, Cummings and Briggs, during the critical period before the election, never performed any tasks associated with the DNS or ADNS positions.

The Board has consistently held that an employee's actual status as of the eligibility date and the date of the election governs that employee's eligibility to vote. *Plymouth Towing Co.,* 178 NLRB 651 (1969); *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973). Thus, an employee who has notified an employer of the employee's intention to resign or retire will nonetheless be deemed eligible to vote in an election provided that the employee is currently employed by the employer on the eligibility date and at the time of the election. See, e.g., *Columbia Steel Casting Corp*., 288 NLRB 306 fn. 4 (1988), *Harold M. Pitman Co*., 303 NLRB 655 (1991), and *Thorn Americas, Inc*., 314 NLRB 943, 945 (1994), and cases cited therein. In those cases, the Board followed its longstanding policy that events occurring after an election do not affect an employee's voting eligibility even if the employee, after the event, clearly no longer would have a community of interest with the unit employees.

Evenhanded application of the well-established eligibility rules cited above clearly requires that Cummings and Briggs be found eligible to vote in this case.[7] Our dissenting colleague, however, has chosen to deviate from this well established precedent in adopting the hearing officer's finding that Cummings and Briggs are ineligible based on community of interest grounds because, as of the election, their interests were more closely aligned with management due to their impending and announced promotions. Specifically, the dissent finds these individuals ineligible because Cummings and Briggs were to assume supervisory positions two weeks after the election and because the Employer told its employees about it on several occasions during the critical period before the election. We do not agree. That Cummings and Briggs were going to assume the DNS and ADNS positions, respectively, after the election and that this was announced to unit employees should have no bearing on their voting eligibility even if they would no longer possess a community of interest with the unit employees after the critical period.

Thus, we reverse the hearing officer, overrule the challenges to the ballots of Cummings and Briggs, and direct that their ballots be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this decision, open and count the ballots of Joyce Cummings and Susan Briggs and prepare and serve on the parties a revised tally of ballots for voting unit A. Thereafter, the Regional Director shall issue the appropriate certification for that unit.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for New England Healthcare Employees Union District 1199, a/w Service Employees Interna-

[6] The Employer contends that because the community-of-interest argument, on which the hearing officer relied in her recommendation that the challenges to the ballots of Cummings and Briggs be sustained, was never raised at the hearing, the hearing officer is precluded from analyzing the employees' eligibility on that basis. We reject the Employer's argument. The Union's challenges to their ballots clearly placed the eligibility of Cummings and Briggs at issue based on their impending assumption of supervisory duties. This challenge is broad enough to encompass the issue of whether their impending assumption of supervisory duties warranted their exclusion from the unit on community of interest grounds.

Thus, under these particular facts, we find that after the hearing officer determined that there was insufficient evidence to conclude that Cummings and Briggs were supervisors under the Act, it was not improper for her to consider, on the basis of the same fully litigated facts, whether they had a community of interest with the unit employees sufficient to support their inclusion in the unit. Cf. *Wells Fargo Alarm Services*, 289 NLRB 562, 564 (1988) (Board found that the issue of employees' eligibility, having once been properly raised, encompassed consideration of the challenged employees' status on a ground not raised by challenging party under particular facts presented, i.e., where the issue involved the unit's statutory appropriateness). In addition, we find that the case relied on by the Employer, *Iowa Lamb Corp*., 275 NLRB 185 (1985), is inapposite because it involved objectionable conduct that was neither alleged nor litigated and wholly unrelated to the issues set for hearing. Accord: *Precision Products Group, Inc*., 319 NLRB 640 (1995), also cited by the Employer, which was found to be governed by *Iowa Lamb*, supra.

[7] We believe that our approach has the advantage of providing a bright line and sticking to it. By contrast, our colleague's approach injects lack of certainty into an area that has long been settled.

tional Union, AFL–CIO and that it is the exclusive collective-bargaining representative of the employees in the following unit:

> All full-time and regular part-time LPNs, CNAs, PCAs, dietary employees, housekeeping employees, activities employees, and laundry employees employed by the Employer at its 184 Main Street, Fairhaven, Massachusetts Facility, but excluding all other Employees, clerical employees, managerial employees, guards and all supervisors as defined in the Act.

MEMBER FOX, dissenting.

The majority reverses the hearing officer to find that Joyce Cummings and Susan Briggs are eligible voters and that their ballots should be open and counted. In so doing, they correctly note that an employee's eligibility to vote turns on the employee's actual status as of the eligibility date and the date of the election. See, e.g., *Plymouth Towing Co.,* 178 NLRB 651 (1969). But they then discount the hearing officer's findings that when the election occurred, Cummings and Briggs had already been hired for the stipulated supervisory positions of director of nursing services (DNS) and assistant director of nursing services (ADNS), respectively, and had been presented to the employees as their future supervisors. Contrary to my colleagues, I agree with the hearing officer that the facts demonstrate that these individuals *at the time of the election* had *already* become closely aligned with management and therefore lacked a sufficient community of interest with unit employees to be considered eligible voters. I would, therefore, sustain the challenges to their ballots.

In its October 15 memorandum, announcing the promotions of Cummings and Briggs, the Employer urged employees to "[p]lease join me in congratulating both Joyce [Cummings] and Susan [Briggs] in their new leadership roles. We are looking forward to them assuming their new positions on or about November 8, 1999." The October 15 memorandum, was posted throughout the Employer's facility. During the week before the election, the Employer sent a campaign letter to all of the employees on the *Excelsior* list, urging them to vote against the Union, explaining why they should do so, telling them that it was "very excited" about Cummings and Briggs becoming the new DNS and ADNS, and promising them that Cummings and Briggs were both "committed to assisting you reach your full potential" as employees. Two days before the election, the employer introduced Cummings as the new DNS by assembling the employees at the nursing station.[1] Speaking to the employees as their future supervisor, Cummings told them that her "door would be open to all employees" if they had "any problems," and that she was "going to try to work hard" to meet the employees' needs, including scheduling.

Thus, less than 2 weeks before the election, the Employer announced to all employees that 2 of their fellow employees, Cummings and Briggs, were being appointed to the second and third highest management positions in the entire organization, and that these appointments would become effective within 2 weeks after the election. The Employer asked the employees to join the Employer in congratulating Cummings and Briggs on their appointments to top management. Shortly after that, the Employer asked the employees in writing to vote against the Union, and expressly linked that request with both a declaration of great excitement about its appointment of Cummings and Briggs to their new management positions, and a promise that Cummings and Briggs would help the employees reach their "full potential" as employees. Finally, just 2 days before the election, Cummings herself told the assembled employees that, as director of nursing services, her door would be open to all employees with "problems," and that she was going to work hard in her new job to meet "the needs" of the employees.

Contrary to the majority, I find this case to be distinguishable from one in which, prior to an election, a unit employee has simply announced his intention to leave the unit at some time after the election. In those circumstances, nothing has occurred that might put the interests of the employee at odds with those of the unit employees or that might otherwise cause the employee to feel an obligation to vote in accordance with management's wishes. Here, however, the employees in question had, as of the time of the election, already experienced a change in their status vis-a-vis the other unit employees that would reasonably be expected to cause them to regard themselves as aligned with management rather than with other unit employees.

That Cummings and Briggs were still in unit employee positions and had not yet formally assumed their new management positions is not dispositive. In this regard,

[1] The hearing officer's misstatement that Jasinski announced Briggs' appointment at the same time he personally introduced Cummings does not affect my conclusions here in light of evidence that unit employees were clearly aware of Briggs' appointments prior to October 24, when the Employer posted its memorandum announcing the promotions on October 15. Further, in adopting the hearing officer's recommendation regarding Cummings and Briggs, I would not rely on the hearing officer's finding that Jasinski changed his testimony as to whether during the period preceding the election he asked the then current ADNS to train Briggs or any implications in the hearing officer's report about the Employer's possible motive for the timing and method of announcing promotions of Cummings and Briggs to management positions.

this case seems to me to be analogous to those involving employees who are relatives of management. In such cases, the Board does not apply a bright-line test but rather considers a variety of factors in deciding whether an employee's familial ties are sufficient to align his interests with management and thus warrant his exclusion from the unit. *NLRB v. Action Automotive*, 469 U.S. 490, 495 (1985). The Board has held, with Supreme Court approval, that where an employee-relative's interests are aligned with management, he may be excluded from the unit even though he enjoys no special job-related benefits. Id. Thus, in *Marvin Witherow Trucking*, 229 NLRB 412 (1977), cited by the Court in *Action Automotive,* supra, the Board held that the father of the owner of a sole proprietorship did not have a sufficient community of interest with the other employees to be included in the unit, even though he worked as a truckdriver under the same terms and conditions as other unit employees. The Board said there that:

> It would contradict human experience to contend that the relationship between [the son] and [his father] is merely that of Employer and part-time employee. While this relationship may not always result in easily identifiable special privileges or working conditions, it establishes an area of interest not shared by the other employees.

229 NLRB 412. Similarly, here, it would "contradict human experience" to contend that the relationship between the Employer and the individuals he has already selected to be director and assistant director of nursing is merely that which exists between the Employer and the rest of the unit employees. While the Employer's actions may not yet, at the time of the election, have resulted in a formal change in Cummings' and Briggs' job titles or work assignments, they clearly created for them "an area of interest not shared by the other employees." Therefore, I agree with the hearing officer's recommendation to sustain the challenges to the ballots of Joyce Cummings and Susan Briggs.